IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.562 OF 2005
IN
NOTICE OF MOTION NO.1336 OF 2005
IN
SUIT NO.1165 OF 2004

Dharti Dredging and Construction Limited .. Appellant

v/s.

Afcons Infrastructure Limited .. Respondent

Mr.V.Sheth with Mr.Ruben Fernandes for the appellant.

Mr.Virag V.Tulzapurkar with Mr.H.Toor i/by M/s.Crawford Bayley & Co. for the respondent.

CORAM : R.M. LODHA AND
J.P. DEVADHAR, JJ.

DATED : 20th July, 2005

P.C.

Heard Mr.V.Sheth, the learned counsel for the appellant and Mr.Virag Tulzapurkar, the learned counsel for the respondent.

2. The plaintiff is in appeal against the order dated 31st March, 2005 passed by the learned motion Judge refusing to pass decree on admission in the sum of Rs.29,35,248/- as claimed by the plaintiff under Order XII Rule 6 of the Code of Civil Procedure.

3. As per the case set up by the plaintiff, by letter dated 11.6.2002, the defendant admitted his liability to pay an amount of Rs.35,35,248/-. Out of that, an amount of Rs.6,00,000/- was paid by the defendant on 29th August, 2002 leaving behind the admitted liability of Rs.29,35,248/-.

4. In opposition to the notice of motion, the learned counsel for the defendant set up the case that the letter dated June 11, 2002 cannot be said to be an unequivocal, clear and positive admission of the liability as it is "without prejudice". Moreover, according to the defendant, the letter dated 11th June, 2002 was written during the course of negotiations between the parties for resolution of their differences and therefore, being the privilege document was not admissible in evidence.

5. The learned motion Judge was persuaded by the submissions of the defendant and accordingly, by order dated 31st March, 2005 dismissed the notice of motion, giving rise to the present appeal.

6. The two letters upon which reliance is placed by the plaintiff may be immediately adverted to. The letter dated June 11, 2002 reads thus-

"**AFCONS**

AFCONS INFRASTRUCTURE LIMITED

Ref.No.:Tech/AKK/43115 June 11, 2002

Registd.A.D.

Without Prejudice

To
M/s.Dharti Dredging & Const.Ltd.
5th Floor, Varun Towers
Begumpet
Hyderabad - 16

Kind Attn.: Mr.K.Kanta Rao- Director

Ref: Your Letter No.12:26/2146, Dt.31.05.02

Dear Sir,

With reference to your above referred letter, we wish to reiterate that the total outstanding payment due to M/s.Dharti Dredging is as follows:-

1. Scrutiny Deposit:	Rs.12,84,416 subject to submission of Bank Guarantee in the prescribed format
2. Escalation Bill :	Rs.6,37,639
3. Release of excess recovery :	Rs.8,41,688
4. Final Bill :	Submitted through your letter No.12:26/911, Dt. 23.11.01. The final amount upon verifications due to the extent of Rs.7,71,505. This is further, subject to certification by GMB for Item No.1.

We trust that the above points clarify the matter in regard to total outstanding payments due to you.

Kindly acknowledge the receipt of this letter.

Thanks and regards,

Yours faithfully,
AFCONS INFRASTRUCTURE LTD.
sd/-
(A.K.KASHALKAR)
SR.VICE PRESIDENT"

The other letter dated 14.10.2002 reads thus-

"**AFCONS**

AFCONS INFRASTRUCTURE LIMITED

Ref.:2196/AKK/43478 14.10.2002

M/s.Dharti Dredging Corporation Ltd.
5th Floor, Varun Towers
Begumpet
Hyderabad - 500 016
Tel.No.91-0-40-7761437
Tel.No.91-0-40-7760934

Kind Attn.Mr.P.V.Krishna.

Sub: Dredging and Reclamation for development of fishery Harbour at Jakhau Port

Dear Sir,

This has reference to your letter no.: 12:26/2259 dated 16.09.2002.

In this connection please refer to our letter No.:Tech/AKK/43115 dated 11th June, 2002 (a copy enclosed for your reference) wherein we have indicated the balance payment due to you, which total upto Rs.35,35,248/-. Out of this amount we have released a sum of Rs.6.0 Lacs on 29th August 2002, as acknowledged by you in your above letter.

This payment has been released against the excess recoveries made (Refer Sr.No.:3 of our above letter).

Other than what has been stated in our letter : Tech/AKK/43115 dated 11th June 2002, nothing further is due to you, which please note.

Thanking you,

Yours faithfully,
Afcons Infracture Ltd.,
Sd/-
(A.K.Kashalkar)
Sr.Vice President

c.c. : Bank of Bahrain & Kuwait BSC
Akashganga, Somajigude
Hyderabad - 500082."

7. From the available material, it appears that after completion of the main contractual work somewhere in the month of November, 2000, the differences arose between the parties on diverse aspects, amongst others, payment received by the plaintiff for dredging as compared to quantum actually dredged by the plaintiff; the deduction by the defendant towards supply of High Speed Diesel (HSD) and Engine Oil to the plaintiff; the deduction by the defendant for hire charges of equipment hired at risk and cost of the plaintiff; the payment of escalation bill No.1 for Rs.7,61,098/- submitted by the plaintiff to the defendant and refund of security deposit being retention monies by the defendant to the plaintiff. The parties appeared to have discussed the matter for resolution of the differences.. This is apparent from the letter dated 17.9.2001 written by

the plaintiff to the defendant. The said letter dated 17.9.2001 refers to the meeting held between the parties on 15.9.2001 at Afcons House and that records the gist of the discussion held on 15.9.2001. The subsequent correspondence between the parties is in the backdrop of the meeting held on 15.9.2001. The letter dated June 11,2002 is admittedly 'without prejudice' and the said letter, prima facie, seems to have been written during the course of negotiations between the parties for resolution of dispute and differences and privilege may be claimed by the defendant in this regard. We do not intend to record any firm finding in respect of admissibility of the letter dated June 11, 2002, but suffice it to say that it is not unequivocal and positive. The letter dated 15.10.2002 is in continuation of the 'without prejudice' letter dated June 11, 2002 and has to be read alongwith the letter dated June 11, 2002 and not in its isolation.

8. In this backdrop, the finding of the learned motion Judge that the so called admission is not conclusive admission of liability by the defendant, cannot be faulted. In the facts and circumstances of the case, refusal to grant decree under Order XVII Rule 6 by the learned motion Judge on the

basis of the letter dated 11th June, 2002 does not suffer from any legal infirmity.

9. The appeal does not deserve to be admitted. Dismissed in limine.

(R.M. LODHA, J.)

(J.P. DEVADHAR, J.)